IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A. O. NO. 276 OF 2006

Vimlabai Dinkar Junnare and ors. ... Appellants
VS.
Sou. Rohini Ramesh Patil and ors. ... Respondents

Mr. Haridas for P. N. Joshi for appellants
Mr. U. R. Mankapure for respondent nos. 1 to 4.

CORAM: D. G. KARNIK **J.**
DATE: 13th November 2006

P.C.:

1. Heard learned counsel for the parties. By consent appeal is heard finally at the stage of admission itself.

2. This appeal is directed against the judgment and order dated 13th January 2004 passed by the Civil Judge, Senior Division , Nasik, rejecting the appellant' application (Misc. application No. 312 of 2000, for restoration of the suit by setting aside of the ex parte decree, made under Order 9 Rule 13 of the Civil Procedure Code.

3. The respondent filed a suit bearing Special Civil Suit NO. 296 of 1997 against the appellant for specific performance of an

agreement of sale. The appellant appeared in the case but did not file a written statement. The court decided to proceed with the hearing of the suit without written statement of the appellant and directed the respondents to adduce oral evidence on affidavit. Accordingly the respondents filed affidavits of witnesses in lieu of evidence. After consideration of the evidence adduced the trial court, by its judgment and order dated dated 24th August 2000 decreed the suit and passed a decree for specific performance.

4. The appellant thereafter made an application under Order 9 Rule 13 of the Civil Procedure Code, and prayed for restoration of the suit by setting aside the ex parte decree. The trial court, however, dismissed the said application relying upon the decision of this court in the case of Dhanwantrai R. Joshi v/s. Satish J. Dave, reported in III (1999) CLT 243. In Dhanwantrai's case (supra) a Division Bench of this court has held that an application for setting aside a decree passed under Order 8 Rule 10 of the CPC made Order 9 Rule 13 is not maintainable and the only remedy in such a case is to challenge the decree by filing an appeal.

5. It would be necessary to see whether the decree passed in Special Civil Suit NO. 296 of 1997 was an a decree passed under Order 8 Rule 10 or was passed under Order 9 Rule 6

of the Civil Procedure Code. Order 8 Rule 10 of the Civil Procedure Code says that where any party from whom a written statement is required under rule 1 or rule 9 of Order 8 fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit. Order 8 Rule 10 of the Civil Procedure Code gives the power to the court to pass a judgment in favour of the plaintiff merely on the failure of the defendant to file the written statement but does not oblige it to do so. Where the defendant fails to file the written statement within the stipulated period the court may instead of passing a decree pass such other order as it thinks fit. If the court chooses not to pass the judgment without requiring the plaintiff to adduce any evidence but requires the plaintiff to adduce evidence, whether on oath or affidavits, it amounts to the court not pronouncing the judgment under Order 8 Rule 10 of the Civil Procedure Code but passing any other order as permitted by law. In that case the court proceeds ex parte under Order 9 Rule 6 of the Civil Procedure Code. On appreciation of the evidence it would be open to the court to accept the evidence and pass a decree or the court may come to the conclusion that the evidence falls short for it to pass a decree or may even dismiss the suit. Where the court passes a decree after consideration the evidence, documentary as

well as oral - on oath or on affidavit – , the court would essentially be passing a decree under Order 9 Rule 6 of the Civil Procedure Code.

6. I have perused the judgment of Special Civil Suit NO. 296 of 97 dated 24th August 2000. In para 3 of the judgment of the the court has clearly stated that the court required the plaintiff to adduce evidence by its order below exhibit 18. Thus the court decided not to pass a decree straight away under Order 8 Rule 10 but decided to proceed ex parte against the plaintiff under Order 9 Rule 6 of the Civil Procedure Code. The decree passed was thus an ex parte decree under Order 9 Rule 6 and not under Order 8 Rule 10 of the Civil Procedure Code. The case is thus not covered by the decision of the Division Bench in the case of Dhanwantrai vs. Satish J. (supra). On the other hand the ration of two decisions of this court in Chandrakant Babulal Panchal vs. Ashwinibhai Mancharam Patel, reported in 2003(1) Bom. C.R. 37 and The Steamship Mutual Underwriting Association (Bermuda) Ltd. & ors. vs. Thakur Shipping Company Limited reported in 2001 (3) ALL MR 159, is similarly applicable to the facts of tis case.

7. The trial court has not dismissed the application of the appellants on merits but dismissed it only on the ground that

it was not maintainable. In the circumstances the impugned order needs to be set aside. The appeal is accordingly allowed and the impugned order is set aside. The matter is remanded back to the trial court for deciding it afresh on the merits of the case.

(D.G. KARNIK J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
Civil application No. 1300 of 2005
in
A. O. NO. 276 OF 2006

Vimlabai Dinkar Junnare and ors. ... Applicants
VS.
Sou. Rohini Ramesh Patil and ors. ... Respondents

Mr. Haridas for P. N. Joshi for appellants
Mr. U. R. Mankapure for respondent nos. 1 to 4.

CORAM: D. G. KARNIK **J.**
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In view of the disposal of the appeal this civil application does not survive and is disposed of with liberty to the applicants to move the trial court for appropriate orders.

(D.G. KARNIK J.)